ORIGINAL

NO. 82-6923

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

ALVIN BERNARD FORD,

Petitioner,

-v-

CHARLES G. STRICKLAND, JR., Warden, Florida State Prison, LOUIE L. WAINWRIGHT, Secretary, Department of Offender Rehabilitation, State of Florida; JIM SMITH, Attorney General, State of Florida,

Respondents.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

I.

Whether the Eleventh Circuit's holding that the Florida Supreme Court's alleged receipt of non-record material in capital cases does not establish a constitutional violation in view of the express disclaimer of the use of the materials by the Florida Supreme Court raises a substantial Federal question?

II.

Whether the Eleventh Circuit's holding that the Florida Supreme Court's affirmance of the Petitioner's death sentence despite its striking eight of the five aggravating circumstances did not violate the Eighth Amendment raises a substantial Federal question, particularly in light of this Court's decision in Zant v. Stephens, ___ U.S. ___, No. 81-89 (Op. filed 6/22/83)?

III.

Whether the Contention that aggravating circumstances must outweigh mitigating factors beyond a reasonable doubt, raises a substantial Federal question in view of the Petitioner's procedural default in the State system and this Court's decision in Zant v. Stephens, ___ U.S. ___, No. 81-89 (Op. filed 6/22/83)?

IV.

Whether the Eleventh Circuit created conflict with precedent or raised a substantial Federal question by applying the procedural

bar of Wainwright v. Sykes, 433 U.S. 72 (1977) to the Petitioner's Lockett v. Ohio, 438 U.S. 586 (1978) claim?

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OPINIONS BELOW

The opinion of the United States District Court, Southern District of Florida, was entered on December 10, 1981. It is not reported, but it is included in the Petitioner's appendix at pages 104a - 118a. The panel opinion of the Eleventh Circuit Court of appeals is reported at 676 F. 2d 434 (11th Cir. 1982). The en banc opinion is reported at 696 F. 2d 804 (11th Cir. 1983).

JURISDICTION

Respondents accept the Petitioner's Jurisdictional Statement.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Respondents accept the Petitioner's Statement of the applicable provisions.

STATEMENT OF THE CASE

A. Preliminary Statement

The Petitioner was the Petitioner-Appellant in the Eleventh Circuit Court of Appeals and the Petitioner in a habeas corpus proceeding brought pursuant to 28 U.S.C. §2254 in the United States District Court for the Southern District of Florida. The Respondents were the Respondents-Appellees in the Eleventh Circuit and the Respondents in the District Court. In this pleading, the parties will be referred to as they appear before this Honorable Court.

The following symbols will be used:

"R" Record on Appeal in the Eleventh Circuit of the District Court pleadings

"SR" The supplemental record filed by the Petitioner in the Eleventh Circuit

"T" Transcript of the state trial held December 9-18, 1974

B. History of the Case

In 1974, the Petitioner was convicted of the crime of first degree murder in the Circuit Court of the Seventeenth Judicial Circuit, In and For Broward County, and sentenced to death. The Florida Supreme Court affirmed both the judgment and sentence on direct appeal. Ford v. State, 374 So. 2d 496 (Fla. 1979). This Court denied the Petitioner's Petition for Certiorari. Ford v. Florida, 445 U.S. 972 (1980).

The Petitioner was one of one hundred twenty three death row inmates who filed a petition for habeas corpus in the Florida Supreme Court, challenging that court's alleged practice of receiving non-record material in connection with its review of capital cases. The Court dismissed the Petition, Brown v. Wainwright, 392 So. 2d 1327 (Fla. 1981), and this Court denied certiorari. Brown v. Wainwright, 454 U.S. 1000.

A death warrant for the Petitioner was signed by the Governor of Florida requiring that he be executed by December 11, 1981. The execution was scheduled for December 8. The Petitioner thereupon filed a Fla.R.Crim.P. 3.850 motion for post conviction relief

and its order was appealed to the Florida Supreme Court. That court, after briefing and argument, rendered an opinion on December 4, 1981, affirming the trial Court's order and denying the request for a stay of execution. Ford v. State, 407 So. 2d 907 (Fla. 1981).

The Petitioner also filed a petition for habeas corpus in the United States District Court, Southern District of Florida, on December 1, 1981 (R 1-30). The Respondents' response was filed December 4, 1981 (R 65-101), and hearings were held by the Court on December 5 and 7, 1981. At the conclusion of the December 7 hearing, the Court denied relief and the request for a stay of execution. An order containing the Court's findings of fact and conclusions of law was entered (R 113-127). On that same date, the Eleventh Circuit granted a stay of execution to the Petitioner for the stated purpose of preserving his right to appellate review.

At the request of the Respondents, the appeal was expedited, and on April 15, 1982, a panel of the Eleventh Circuit entered an opinion affirming the District Court's denial of relief. Ford v. Strickland, 676 F. 2d 434 (11th Cir. 1982). The Court then sua sponte ordered a rehearing en banc. Supplemental briefs were filed, argument was heard, and on January 7, 1983, the Court rendered an opinion, again affirming the District Court's judgment. Ford v. Strickland, 696 F. 2d 804 (11th Cir. 1983). After rehearing was denied, the instant Petition was filed. A stay of the Eleventh Circuit's mandate was entered by Justice Powell on April 15, 1983, to be effective while the instant proceeding is pending.

C. Statement of the Facts

The State proved that the Petitioner, Alvin Bernard Ford, committed the crime of first degree murder of Fort Lauderdale police officer Dimitri Ilyankoff through the testimony of numerous witnesses. The murder occurred on July 21, 1974, when Ford, along with three accomplices, set out to rob the Red Lobster restaurant in Fort Lauderdale.

Two unimpeached eyewitnesses to the attempted robbery, Norman Phillips and Ethel Burgess, testified that Ford entered the restaurant with a gun and herded them into a freezer, after forcing Phillips to open the safe. (T 471-475, 791,798). Two of the co-defendants originally indicted with Ford, DeCosta and Lewis, testified that Ford had participated in planning the robbery (T 575-576, 655), entered the restaurant with a gun (T 581), and did not leave with them when they decided to go because the police were coming (T 584-586, 673-675). A statement by Ford was admitted into evidence. In the statement, Ford admitted he had participated in the robbery (T 1136-1137), but not the shooting (T 1137). Jacqueline Burrows was near the restaurant, heard shots, looked over, and saw a black male run to a patrol car, look inside, and run back to the restaurant (T 847). She heard another shot, and then he drove off in the police car. (T 847). Ford's fingerprints were found in the police vehicle when it was recovered (T 1050-1053). Two witnesses saw a man matching Ford's description get out of a police car and into a green Volkswagon (T 853, 680-861), and Ford was arrested in that car in Gainesville, Florida, at 9:00 P.M. that same date (T 1031).

Barbara Buchanan, who had been ordered by one of the robbers to stay inside a utility closet that had a slatted door (T 753), said she saw the other robbers leave before the officer arrived (T 755). When the officer came, he got out of his car, two shots were fired, and he fell (T 757). Ford came out of the restaurant, went to the car, and then back to the fallen officer and asked where his keys were. The officer said, "I don't know". (T 759). Ford picked up the keys, shot the officer in the head, and drove off in his car (T 759).

At the sentencing phase of the Appellant's trial, the State did not introduce any additional evidence (T 1313). The defense called two lay witnesses, the Appellant's mother and a friend, who testified about his background (T 1313-1322), and a psychiatrist, Dr. Taubel, who testified that the Appellant had been depressed over employment problems (T 1333) and consequently started fast

a potential for rehabilitation and has moral standards (T 1339).

D. Facts Material to the Questions Presented

The Petitioner has asked this Court to grant certiorari to consider four of the seven issues which he raised in the Eleventh Circuit. As to these four issues, the members of the court were not in unanimous agreement. On Question One, "the Brown issue", the Court below voted 6-5 to affirm. On Question Two, the Florida Supreme Court's affirmance of the conviction although it struck three of the aggravating circumstances found by the trial judge, seven judges voted to affirm, two dissented, and two would certify a question of law to the State Supreme Court before ruling. Concerning Question Three, the standard of weighing aggravating and mitigating circumstances, nine judges voted to affirm, two dissented. Regarding Question Four, the instructions on mitigating circumstances, ten judges voted to affirm and one judge dissented.

The Respondents will review the facts underlying each issue.

(1) The "Brown" issue

The Petitioner was a party to the Florida Supreme Court case of Brown v. Wainwright, 392 So. 2d 1327 (Fla. 1981). In his District Court Petition for Habeas Corpus, he alleged the Florida Supreme Court had received non-record information in his case (R 20, 56-59), but he admitted, when pressed by the District Judge, that no such material was found in his Florida Supreme Court file (SR 7). The Supplemental Appendix the Petitioner has included with his Certiorari Petition, contains material from the Brown case which was never part of the record in this case and it should be disregarded, as well as any references to it in the Petition. The Eleventh Circuit's ruling was based on a reading of the Brown opinion.

(2) The Florida Supreme Court's affirmance of the Conviction although it struck three of the Eight aggravating circumstances.

The trial court instructed the jury at the conclusion of the sentencing phase of the trial that they should consider whether the statutory eight aggravating factors were applicable (T 1247-1248). The jury returned an advisory recommendation of death (T 1358). The trial

judge concurred in the recommendation and imposed the death sentence in a written order which is reproduced in the Florida Supreme Court's opinion on direct appeal Ford v. State, 374 So. 2d 496, 500-502, f.n. 1 (Fla. 1979). The trial court found that all eight statutory aggravating factors existed, while the Florida Supreme Court held that two of the factors were inapplicable and a third had been erroneously "doubled," see Provence v. State, 337 So. 2d 783 (Fla. 1976), but that there were five valid aggravating circumstances, no mitigating factors. As a result, the Court came to the "the inescapable conclusion that the proper sentence is the death penalty." Ford v. State, supra, 374 So. 2d at 503.

The Petitioner argued in the District Court and in the Eleventh Circuit that the Florida Supreme Court's affirmance was error because the jury's sentencing discretion was not adequately channeled and the process by which the sentence was imposed was rationally reviewable. The Petitioner never made the claim, as he does now, that the Florida Courts had disregarded nonstatutory mitigating circumstances contrary to Lockett v. Ohio, 438 U.S. 586 (1978).

(3) Standard of Weighing Aggravating and Mitigating Circumstances

The Petitioner never argued at trial or on direct appeal that the jury should have been instructed that it had to find the aggravating circumstances outweighed the mitigating circumstances beyond a reasonable doubt. Trial counsel did not object to the instructions as given (T 1349-1350), and it is further evident that he made a clear tactical choice to de-emphasize certain instructions (T 1309-1310). The Florida Rules of Criminal Procedure, Rule 3.390, require an objection to the jury instructions and provide that failure to do so forecloses appellate review. Consequently, when the issue was raised for the first time in the collateral attack, the State moved to strike it as procedurally barred, the trial court did so, and the Florida Supreme Court affirmed. Ford v. State, 407 So. 2d 907 (Fla. 1981).

The District Court therefore ruled that any claim of error concerning the sentencing phase jury instructions was barred by Wainwright v. Sykes, 433 U.S. 72 (1977) (R 116). The Respondents reasserted their procedural bar argument in the Eleventh Circuit. The Court, however, chose to rule on the merits with the exception of Judge Tjoflat, who agreed with the Respondents' Wainwright v. Sykes, supra, argument. The issue on which the Court ruled, however, is narrower than the one the Petitioner asserts in his Petition. Before the Eleventh Circuit, the Petitioner argued only that the aggravating circumstances must outweigh the mitigating beyond a reasonable doubt. He now attempts to argue that a reasonable doubt standard should apply to all capital sentencing determinations, an issue which was not presented to or decided by the Court below.

(4) Jury Instructions on Mitigating Circumstances

The Petitioner never objected to the wording of the jury instructions regarding the mitigating circumstances at the time of trial (T 1349-1350). Thus, Florida law prohibited his later collateral attack on the conviction on the ground of erroneous jury instructions Fla.R.Crim.P. 3.390. Accordingly, the Florida Supreme Court approved the trial court's order striking this ground from the Fla.R.Crim.P. 3.850 motion for post-conviction relief. Ford v. State, 407 So. 2d 907 (Fla. 1981).

In the habeas corpus proceeding, the District Court held the Petitioner's failure to timely object to the jury instructions barred his claim that the instructions unconstitutionally limited consideration of the mitigating factors. (R 116). The Eleventh Circuit in its en banc opinion affirmed. The majority held the Petitioner had failed to demonstrate "prejudice" accruing from his procedural default so as to come within an exception to the rule of Wainwright v. Sykes, 433 U.S. 72 (1977), and Judge Tyoflat, concurring, found out the Petitioner had not established "cause."

I. THE ELEVENTH CIRCUIT'S HOLDING THAT THE FLORIDA SUPREME COURT'S ALLEGED RECEIPT OF NON-RECORD MATERIAL IN CAPITAL CASES DOES NOT ESTABLISH A CONSTITUTIONAL VIOLATION IN VIEW OF THE EXPRESS DISCLAIMER OF USE OF THE MATERIALS IN BROWN V. WAINWRIGHT, 392 SO. 2D 1327 (FLA. 1981) IS CONSISTENT WITH THIS COURT'S DECISION IN HARRIS V. RIVERA 454 U.S. 339 (1981), AND FAILS TO RAISE A SUBSTANTIAL FEDERAL QUESTION.

The Petitioner contended below, as he does here, that the Florida Supreme Court was engaged in the ex parte regular systematic practice of soliciting and receiving extra-record psychiatric and psychological reports including presented reports, psychological screening reports, etc., and that this practice affected the appellate function of that court in capital cases. The Eleventh Circuit, in resolving his claim, relied on the Florida Supreme Court's decision in Brown v. Wainwright, 392 So. 2d 1327 (Fla. 1981), cert. denied 454 U.S. 1000 (1981). In Brown, the Petitioner and other capital appellants filed a Petition for Writ of Habeas Corpus in the Florida Supreme Court alleging the claimed violation and the Petition was denied. The Florida Supreme Court, in the Brown decision, said that its view of non-record information was irrelevant to its appellate function in capital cases as it bears on the operation of the statute or the validity of any sentence. Id. at 1331. "Factors or information outside the record play no part in our sentence review role...non-record information we may have seen, even though never presented to or considered by the judge, the jury, or counsel, plays no role in capital sentence 'review'." Id. at 1332-1333.

The Eleventh Circuit in the instant case accepted the Florida Supreme Court's statement in Brown that its sentence review function was not affected by its view of any non-record information as dispositive, "end[ing] the matter when addressed at the constitutional level." Ford v. Strickland, 696 F. 2d 804, 811 (11th Cir. 1983) (en banc). This holding is entirely in accord with the decision in Harris v. Rivera 454 U.S. 339 (1981), wherein this court emphasized the presumption of regularity, saying that a federal court may not require a state court to explain the reasons for its actions

unless it first determines those actions were unconstitutional. Insofar as any suggestion was made in that case that the trial judge may have considered inadmissible evidence, the court held that judges routinely hear evidence they are presumed to ignore when making decisions, and an apparent inconsistency in the trial judge's verdict did not give rise to an inference of irregularity sufficiently strong to overcome the well established presumption that judges adhere to basic rules of procedure. Likewise, in the instant case, both the plurality and Judge Tjoflat, concurring, found that the Florida Supreme Court's Brown decision makes it clear that non-record information was not used and did not affect the Court's appellate review function, and that mere reading of the material would not have Constitutional implications since judges are capable of disregarding what they should.

This Court has previously had occasion to consider the question presented herein when the Brown decision was before the Court on a Petition for Certiorari, which was denied. Brown v. Wainwright, 454 U.S. 1000 (1981). The reasons submitted by the present Petitioner as to why the Court should grant certiorari now to consider the same issue where it has previously declined to grant review are not persuasive. It is true that the Eleventh Circuit's decision will preclude the claim from being litigated further by individual capital defendants. This is as it should be, as the Florida Supreme Court's decision in Brown is dispositive and the Eleventh Circuit properly recognized it as such. The fact that the Eleventh Circuit did not render a single opinion but divided into a five judge plurality, one judge concurring, and five judges dissenting in three separate opinions, does not present any reason why this court should accept jurisdiction. The issue is one of significance only in Florida, it was thoroughly briefed and rebriefed before a panel and the full en banc court of appeals, and a decision was reached. If anything, the lengthy opinions by the judges below demonstrate the points involved have been fully aired, as completely as possible. The Petitioner lost, and so seeks another chance to win, but further litigation will establish nothing more.

The Eleventh Circuit's and the Florida Supreme Court's opinions do not diverge, as asserted by the Petitioner, on the question of whether Gardner v. Florida, 430 U.S. 349 (1977), applies to appellate as well as trial courts. The Florida Supreme Court in Brown held Gardner inapplicable since its function is to review and not impose death sentences. The Court then stated its sentence review function was unaffected by any non-record information it may have seen. The Eleventh Circuit did not decide the question of Gardner's applicability, for it assumed, without deciding, that the use of non-record material would be unconstitutional. It then went on to determine that the Florida Supreme Court's express disclaimer that its review function was unaffected was dispositive. Thus, the two opinions do not diverge or conflict; the Eleventh Circuit simply held it did not need to reach the issue of Gardner's applicability in order to decide the case.

The Petitioner's discussion of how the Brown case developed and his reference to his supplemental appendix which contains materials from Brown is irrelevant and should be disregarded. These materials were never made part of the record in the instant case.

Finally, the Petitioner's claim that the Florida Court did use non-record materials, citing to McCrae v. Wainwright, 422 So. 2d 824,827 (Fla. 1982), is unfounded. The Court in McCrae simply relied on its prior Brown decision to dispose of the defendant's ground for habeas corpus relief.

In sum, the Petition for Certiorari does not raise a substantial federal question. The Eleventh Circuit's resolution of the issue herein is consistent with this Court's decision in Harris v. Rivera, supra. Certiorari on the same question has already once been denied, Brown v. Wainwright, supra, and the Petitioner has shown no reason why it should be granted now. The thorough analysis of the issue by the Court below has adequately resolved the matter.

II. THE ELEVENTH CIRCUIT CORRECTLY DETERMINED THAT THE FLORIDA SUPREME COURT'S AFFIRMANCE OF THE PETITIONER'S DEATH SENTENCE WHEN IT UPHELD FIVE OF THE EIGHT AGGRAVATING CIRCUMSTANCES FOUND BY THE TRIAL JUDGE DID NOT VIOLATE THE EIGHTH AMENDMENT, AND PURSUANT TO THIS COURT'S DECISION IN ZANT V. STEPHENS, ___ U.S. ___, NO. 81-89 (OPINION FILED JUNE 22, 1983), THE RULING DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION.

The Petitioner states the issue posed herein is similar to those in Barclay v. Florida, No. 81-6908, and Zant v. Stephens, No. 81-89, but with an added dimension - an alleged violation of Lockett v. Ohio, 438 U.S. 586 (1978) and Eddings v. Oklahoma, 455 U.S. 104 (1982). He then notes "the majority opinion below does not address the question actually presented by this case" (Petition p. 30). Small wonder, since the Court was not asked to address it. In his Brief for Petitioner-Appellant filed in the Eleventh Circuit on December 28, 1981, the Petitioner stated:

> The issue presented by these facts is whether jury instructions permitting the consideration of statutory aggravating circumstances which have no evidentiary basis violate the Eight Amendment.

(Brf. for Petitioner-Appellant, p. 21). The Petitioner relied primarily on the Fifth Circuit's decisions in Henry v. Wainwright, 661 F. 2d 56 (5th Cir. 1981) and Stephens v. Zant, 631 F. 2d 397 (5th Cir. 1980). This section of the brief did not cite Lockett or argue anthing about mitigating circumstances; rather, it argued the jury's discretion had been unconstitutionally broadened because it was instructed on eight aggravating factors when the Florida Supreme Court on appeal sustained only five. Subsequently, in his supplemental Brief for Petitioner-Appellant on Rehearing En Banc, the Petitioner argued there were two constitutional defects: the jury's sentencing discretion was inadequately guided and the process by which the sentence was imposed was not rationally reviewable. (Supp. brf. p. 30). Again, the argument was based on Henry v. Wainwright, supra and Stephens v. Zant. Therefore, the Petitioner's present argument that because evidence in mitigation pertaining to nonstatutory factors was presented, it was error to affirm the sentence when three of the aggravating factors were stricken on appeal, was not presented below and cannot be raised now as a basis for invoking this Court's certiorari jurisdiction.

As to the issue that was decided by the Eleventh Circuit, the Court's resolution of the matter is clearly consistent with this Court's opinion in Zant v. Stephens, ___ U.S. ___, No. 81-89 (Op. filed June 22, 1983), and thus no substantial Federal question is presented by this case. In the instant case, the jury was read the list of statutory aggravating circumstances and instructed to consider whether any of those factors, and only those factors, were applicable (Trial transcript pp. 1347-1348). The State presented no additional evidence at the sentencing phase of the trial (Trial Transcript p. 1313) and argued to the jury only the five factors that were later upheld. (Trial transcript pp. 1341-1342). The jury returned with a recommendation that the death sentence be imposed. The trial judge, who in Florida is the sentencer, entered a written order setting forth his findings as to the aggravating and mitigating factors [This order is reproduced in footnote 1 of the Florida Supreme Court's opinion on direct appeal. Ford v. State, 374 So. 2d 496, 500-502, f.n. 1 (Fla. 1979)]. The trial court found all eight statutory aggravating circumstances and no mitigating circumstances, statutory or otherwise, that would outweigh them. Thus, the Florida Supreme Court on direct appeal concluded the sentence should be affirmed, even though it found that three of the eight aggravating factors were erroneous, because there were no mitigating factors and the existence of five valid aggravating factors justified the sentence of death. Id. at 503.

The Eleventh Circuit found no Constitutional error since (1) no improper evidence was admitted or considered; (2) an error in the classification of evidence into eight rather than five factors did not Constitutionally infect the sentence; (3) the Florida Supreme Court's review was fair where there were valid aggravating factors and no mitigating, and (4) there was no error in instructing on all the factors where the jury was advised on the terms of the statute and the burden of proof. In concurring, Judge Godbold stated that he interpreted the Florida Supreme Court's affirmance as applying a harmless error rule which was correcting a misapplication of the statute, and such action passed

by the plurality as an alternative ground.

The Eleventh Circuit's decision is consistent with Zant v. Stephens, supra, wherein this Court held that once the jury had found two permissible aggravating circumstances, the fact it had found a third invalid factor did not affect the Constitutionality of the death penalty. This Court likewise rejected the Stromberg v. California, 283, U.S. 359 (1931) analysis set forth in footnote 19 of the Petition. Finally, the Court held that since the jury had not relied on any inadmissible evidence there was no constitutional infirmity in the instruction on the invalid factor, and a rule of automatic reversal is not required.

In the instant case, as in Stephens, no improper evidence was considered by either the judge or the jury. The jury was not even instructed on invalid factors; it was simply advised to consider whether one or more of the eight statutory aggravating factors applied. The fact that the judge cast admissible evidence into eight factors rather than five was not Constitutional error requiring automatic reversal by the Florida Supreme Court. Throughout this proceeding, the Petitioner has primarily relied on the Fifth circuit's decision in Stephens v. Zant, supra. As that case has now been reversed by this Court, the decision in the instant case was clearly correct and it does not present a substantial federal question. If this Court does grant certiorari, it should be for the limited purpose of summarily vacating that portion of the opinion below which remands the case to the district court for consideration of whether Barclay v. Florida, 411 So. 2d 1310 (Fla. 1982), cert. pending, Case No. 81-6908, may affect the denial of relief in this case Ford v. Strickland, 696 F. 2d 804,807 (11th Cir. 1983) (en banc). Such action would avoid yet another round of appeals through the District and Appellate Courts.

III. PETITIONER'S CONTENTION THAT A REASONABLE DOUBT STANDARD SHOULD BE IMPOSED ON THE DETERMINATION OF WHETHER THE AGGRAVATING FACTORS OUTWEIGH THE MITIGATING FACTORS FAILS TO RAISE A SUBSTANTIAL FEDERAL QUESTION, AS THIS DETERMINATION IS A WEIGHING PROCESS NOT SUSCEPTIBLE TO A STANDARD OF PROOF AND THE PETITIONER PROCEDURALLY DEFAULTED IN THE STATE COURT SYSTEM.

In asking this Court to grant certiorari to decide whether the reasonable doubt standard should apply to capital sentencing determinations, the Petitioner has set forth an issue that was not decided by the Court below. The narrow issue before the Eleventh Circuit was whether, during the sentencing phase of a capital trial, the jury should be instructed that it must find and the Florida Statute requires that the aggravating factors outweigh the mitigating circumstances beyond a reasonable doubt.[1/] The broader issue now presented by the Petitioner regarding all capital sentencing determinations (Petition p. 33) cannot be considered in this proceeding since it was not argued in this manner in the appellate court.

Moreover, as Judge Tjoflat pointed out in his concurring opinion, Id. at 827, 830-831, the Eleventh Circuit should not have decided the merits of the issue before it concerning whether the aggravating factors must outweigh the mitigating beyond a reasonable doubt due to the Petitioner's procedural default in the State Court system. Wainwright v. Sykes, 433 U.S. 72 (1977). This claim was not made at trial or on direct appeal, but presented for the first time in the Petitioner's Fla.R.Crim.P. 3.850 motion for post-conviction relief. The state circuit court refused to consider the claim on its merits because it should have been raised, if at all, during trial and on direct appeal. The Florida Supreme Court affirmed the circuit court's holding that the issue was inappropriate for collateral attack. Ford v. State, 407 So. 2d 907, 908 (Fla. 1981). The Petitioner has demonstrated no cause

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1/ The Court refused to consider the Petitioner's claim, raised for the first time in his supplemental brief, that his sentence was unconstitutional for failure to require the proof of the aggravating circumstances beyond a reasonable doubt since it was never specifically raised or briefed before the panel. Ford v. Strickland, supra, 696 F. 2d at 819.

and prejudice for his procedural default, and the Eleventh Circuit need not have ever reached the merits of his claim. Accordingly, certiorari should not be granted since the Petitioner's argument is foreclosed by Wainwright v. Sykes, Supra.

The issue of whether the aggravating circumstances must outweigh the mitigating circumstances beyond a reasonable doubt does not, in any event, raise a substantial Federal question, particularly in view of this Court's decision in Zant v. Stephens, ___ U.S. ___, Case No. 81-89 (Op. filed June 22, 1983). In Stephens, this Court held that specific standards for balancing aggravating against mitigating circumstances are not constitutionally required, citing to its earlier opinion in Jurek v. Texas, 428 U.S. 262 (1976). The majority opinion in the court below held (1) the fact that aggravating factors must outweigh mitigating factors is not an element of a crime but designed to channel the sentencer's discretion; (2) the Florida death penalty statute, which has upheld as constitutional by the Court in Proffitt v. Florida, 428 U.S. 242 (1976), was followed: and (3) the process of weighing circumstances is a matter for the judge and jury which is not susceptible to a standard of proof by either party.

The Eleventh Circuit's opinion is thus consistent with Zant v. Stephens, Supra, and with this Court's statement in Proffitt v. Florida, Supra, at 258, that:

> The directions given to the judge and jury by the Florida Statute are sufficiently clear and precise to enable the various aggravating circumstances to be weighed against the mitigating ones. As a result, the trial court's sentencing discretion is guided and channeled by a system that focuses on the circumstance of each individual homicide and individual defendant in deciding whether the death penalty is to be imposed.

See also, Gray v. Lucas, 677 F 2d 1086, 1105-1106 (5th Cir. 1982); op. on reh. 685 F 2d 139 (5th Cir. 1982), cert. denied ___ U.S. ___, Case No. 82-6172 [33 Cr L 4031]; Evans v. Britton, 472 F Supp 707, 720-721 (S D Ala. 1979).

It is evident the Petitioner has failed to demonstrate the existence of a substantial Federal question which would serve as a basis for this Court's certiorari review. Rule 17(1)(c) Supreme Court Rules 1980.

IV. THE ELEVENTH CIRCUIT'S DECISION IN THE INSTANT CASE CORRECTLY IMPOSED THE PROCEDURAL BAR OF WAINWRIGHT V. SYKES, 433 U.S. 72 (1977) ON THE PETITIONER'S LOCKETT V. OHIO, 438 U.S. 586 (1978) CLAIM, AND IN SO DOING IT NEITHER CREATED CONFLICT NOR DECIDED A SUBSTANTIAL FEDERAL QUESTION.

The decision of the Court below with regard to the jury instructions on mitigating circumstances neither conflicts with precedent nor raises a substantial Federal question and thus this Court need not grant certiorari.

First, as the Eleventh Circuit recognized, the Petitioner committed a procedural default by failing to raise, either at trial or on direct appeal, the issue of whether the trial court's instructions to the jury limited its consideration of the mitigating circumstances to those listed in the statute. When he did raise the issue in his Fla.R.Crim.P. 3.850 motion, the state trial judge declined to hear it because it was inappropriate for collateral attack. The Florida Supreme Court affirmed. Ford v. State, 407 So. 2d 907, 908 (Fla. 1981) [Petitioner's claim in note 27 that in fact there is no procedural default rule in Florida, a claim he has never previously alleged, is specious; the rule is clearly announced in Florida Supreme Court decisions, e.g. Witt v. State, 387 So. 2d 922 (Fla. 1980), Hargrave v. State, 396 So. 2d 1127 (Fla. 1981), and it was applied in this case. If it has not been applied in every similar situation, that provides the Petitioner no basis for relief. Howard v. Kentucky, 200 U.S. 164,173 (1906). Beck v. Washington, 369 U.S. 541 (1962)] Therefore, the District Court and the Eleventh Circuit properly recognized that pursuant to this Court's opinion in Wainwright v. Sykes, 433 U.S. 72 (1977), the Petitioner was barred due to his procedural default from litigating the merits of the issue.

The majority of the members of the Court below held that the Petitioner had not established prejudice under the "cause and prejudice" exception of Wainwright v. Sykes, Supra, so they did not discuss whether the Petitioner had shown cause. Ford v. Strickland, Supra, 696 F 2d at 812-813. Judge Tjoflat, concurring at pages 828-829 of the opinion, pointed out that the Petitioner had not satisfied the "cause" prong of the exception so the Lockett v. Ohio, 438 U.S. 586 (1978) claim was barred without regard to prejudice. Judge Tjoflat's reasoning is correct, pursuant to this Court's decision in Engle v. Issac, 456 U.S. 107 (1982), and the Fifth Circuit's decisions in Madeley v. Estelle, 606 F 2d 560 (5th Cir. 1979) and Tyler v. Phelps, 643 F 2d 1095 (5th Cir. 1981). Therefore, it was not necessary for the majority to analyze the prejudice aspect, but in any event, their analysis was not in conflict with the cases cited by the Petitioner. In United States v. Frady, 456 U.S. 152 (1982), this Court held that in the case of jury instructions, the degree of prejudice must be such that the ailing instruction infected the entire trial. Cf. Henderson v. Kibbe, 431 U.S. 145 (1977). As the majority pointed out, under the circumstances of the case, a reasonable juror would not have perceived any restriction on the use of mitigating evidence and the Petitioner was not restricted in his presentation of evidence and argument.

The instant case is distinguishable from and not in conflict with the Fifth Circuit's decision in Washington v. Watkins, 655 F 2d 1346 (1981). In Washington, the state's Wainwright v. Sykes, Supra, argument was not considered because the State had failed to make the point in the lower court and the State Courts had not applied a procedural bar, but had addressed the merits of the claim. Washington v. Watkins, Supra, 655 F 2d at 1368. By contrast, in the instant case it is undisputed that the Respondent's Wainwright v. Sykes argument was properly preserved and the Eleventh Circuit applied its procedural bar to the Petitioner's Lockett v. Ohio, 438 U.S. 586 (1978) claim. This fact alone is

sufficient to distinguish the Eleventh Circuit's Ford decision from Washington v. Waktins and thus this court should decline to exercise its certiorari jurisdiction.

Additionally, as the majority pointed out, the language used in the instructions in Washington was different from that used in the instant case, for in Washington the jury was confined to considering "one or more of the preceding elements of mitigation." Id. at 1368, Cited in Ford v. Strickland, Supra, 696 F. 2d at 813. In the instant case, the instruction followed the language of the statute, which this Court interpreted in Proffitt v. Florida, 428 U.S. 242,250 n. 8 (1976) as non-limiting. The Florida Supreme Court has also held, in Songer v. State, 365 So. 2d 696 (Fla. 1978), that the mitigating circumstances are not limited to those in the statute. One further point requires comment: in Florida unlike Mississippi the jury's role is advisory and it is the judge who actually sentences. There is no question in this case that the judge understood his obligation, since in his sentencing order he stated there were no mitigating factors, statutory or otherwise, to outweigh the aggravating.

Therefore, the Eleventh Circuit's decision in the present case does not conflict with Washington v. Watkins, Supra, nor with prior decisions of this Court. The petition for certiorari on this ground does not meet any of the considerations governing review in certiorari, Rule 17, Supreme Court Rules (1980), and it should be denied.

CONCLUSION

WHEREFORE, based upon the foregoing reasons and authorities cited therein, the Respondents request that the Petition for Certiorari be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished this 7 day of July, 1983 by mail to Marvin E. Frankel, Kramer, Levin, Nessen, Kamin & Frankel, 919 Third Avenue, New York, New York 10022; Richard H. Burr, III, 224 Datura Street, 13th Floor, West Palm Beach, Florida 33401 and Laurin A. Wollan, Jr., 1515 Hickory Avenue, Tallahassee, Florida 32303.

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